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### CPLR 302: Application of the Transacting Business Predicate to Acquire In Personam Jurisdiction Over Nonresident Individuals

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direct service in any manner it deems constitutional when other methods of service fail.<sup>39</sup> This section, together with the long-arm jurisdiction and methods of service provided by CPLR 302 and 313, seems to ensure that a plaintiff will almost always have a means available to obtain jurisdiction over an absent defendant. As a result, the toll provided by CPLR 207 will rarely be utilized, since jurisdiction usually will be obtainable by some statutory means other than personal delivery within the state. In addition, while *Yarusso* does not conclusively resolve the *Goodemote-Sadek* controversy, it does increase the likelihood that courts will follow the *Sadek* position. A practitioner defending an action involving the *Goodemote-Sadek* situation therefore should plead lack of jurisdiction or risk losing his client's statute of limitations defense.

#### ARTICLE 3—JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

*CPLR 302: Application of the transacting business predicate to acquire in personam jurisdiction over nonresident individuals.*

The demise of the territoriality concept of jurisdiction<sup>40</sup> and the emergence of a "minimum contacts" approach<sup>41</sup> to the exercise of

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<sup>39</sup> CPLR 308(5).

<sup>40</sup> The Supreme Court, in *Pennoyer v. Neff*, 95 U.S. 714 (1878), indicated that the validity of an "in personam" judgment against a nonresident is dependent upon the defendant's presence in the forum state. This notion of territoriality developed into a rigid rule, severely circumscribing the power of state courts over nonresident defendants. As the nation's transportation and communication facilities increased in sophistication, however, this inflexible concept proved to be inadequate. Consequently, the territoriality theory ultimately waned. See note 41 *infra*.

<sup>41</sup> Before the "minimum contacts" approach was adopted, courts began developing methods to circumvent the rigid territoriality concept. To deal with the problems presented by *Pennoyer's* narrow view of state power, the fictions of "implied consent" and "presence" were used to obtain jurisdiction over nondomiciliaries. See CPLR 302, commentary at 60-61 (McKinney 1972); 1 WK&M ¶ 302.02. Thereafter, in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the Supreme Court departed from *Pennoyer* and reasoned that an individual granted the privilege of conducting activities within a state is charged with assuming certain obligations with respect to that state. Thus, should a suit arise out of that individual's activity within the forum state, it is not unjust to require him to defend the action in that forum. *Id.* at 320. The *International Shoe* Court went on to promulgate guidelines for the exercise of personal jurisdiction over nonresidents: "[I]n order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he [must] have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'." *Id.* at 316 (emphasis added) (citation omitted).

In two major cases that followed the *International Shoe* decision, the Supreme Court seemed to emphasize the qualitative aspect of a defendant's contact with the forum state. In *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), a single contact was considered to

jurisdiction over nonresident defendants provided the impetus for the enactment of CPLR 302.<sup>42</sup> Among the various acts which may serve as predicates for the exercise of personal jurisdiction over a nondomiciliary under 302 is the transaction of any business within the state.<sup>43</sup> The absence of a precise legislative definition of "transacts any business," however, coupled with the elusiveness of the minimum contacts notion, has made it necessary for the courts to determine the scope of CPLR 302(a)(1) on a case-by-case basis. Recently, in *George Reiner & Co. v. Schwartz*,<sup>44</sup> the Court of Appeals further clarified its construction of CPLR 302(a)(1), upholding the assertion of jurisdiction over a nonresident whose sole contact with New York was a 1-day visit during which he made an agreement with a New York corporation for work to be performed outside the state.<sup>45</sup>

Defendant Arnold Schwartz, a Massachusetts resident, responded to an advertisement placed in the Boston Globe by George Reiner and Company, a New York corporation. Subsequently, at the latter's request and expense, Schwartz visited Reiner's corporate offices in Albany and was interviewed by its president. During the

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be a sufficient predicate for the assertion of jurisdiction by a California court over a nonresident insurance company. In the course of its opinion, the Court expressed special concern for a state's legitimate interest in protecting its citizens from out-of-state insurers who are hesitant to make good on claims. Subsequently, in *Hanson v. Denckla*, 357 U.S. 235 (1958), the Supreme Court tempered the holdings of *International Shoe* and *McGee* by concluding that

it is a mistake to assume that this trend [away from the concept of territoriality] heralds the eventual demise of all [jurisdictional] restrictions . . . . However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the [requisite] 'minimal contacts' with that State . . . .

*Id.* at 251.

<sup>42</sup> CPLR 302 was enacted by the legislature in 1962. Ch. 308, § 302, [1962] N.Y. Laws 615 (McKinney). It is a "single act" statute, requiring only one act or occasional acts for the assertion of jurisdiction, see CPLR 302, commentary at 62 (McKinney 1972), provided that the cause of action arises out of defendant's New York activity. In this respect, CPLR 302 is narrower in scope than CPLR 301, as the latter provision permits any cause of action to be maintained once the defendant is shown to be "doing business" in New York. See 1 WK&M ¶¶ 301.17, 302.05.

<sup>43</sup> CPLR 302 provides in part:

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state . . . .

<sup>44</sup> 41 N.Y.2d 648, 363 N.E.2d 551, 394 N.Y.S.2d 844 (1977), *aff'g* 49 App. Div. 2d 58, 371 N.Y.S.2d 177 (3d Dep't 1975).

<sup>45</sup> 41 N.Y.2d at 654, 363 N.E.2d at 555, 394 N.Y.S.2d at 848.

interview, an employment agreement was made which established defendant as an out-of-state salesman for the corporation. More than 4 years later, Reiner instituted an action against defendant, alleging violations of the terms of the employment relationship.<sup>46</sup> Defendant, claiming lack of subject matter and personal jurisdiction, moved to dismiss the action.<sup>47</sup> Upholding defendant's contention that personal jurisdiction under CPLR 302(a)(1) was lacking, the Supreme Court, Albany County, granted the dismissal motion.<sup>48</sup> A divided appellate division reversed and reinstated the complaint.<sup>49</sup>

The Court of Appeals held that jurisdiction may properly be asserted over Schwartz.<sup>50</sup> In resolving the question whether defendant had transacted business in New York, Judge Cooke, writing for a unanimous Court, undertook a brief review of decisions construing CPLR 302(a)(1).<sup>51</sup> Distilling these prior opinions, Judge Cooke found that a nonresident's activities should be viewed collectively rather than individually in determining whether an assertion of jurisdiction is warranted.<sup>52</sup> The *Schwartz* Court was quick to emphasize, however, that a single act might be a sufficient predicate for obtaining jurisdiction over a nonresident defendant.<sup>53</sup> Applying

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<sup>46</sup> Plaintiff, alleging that Schwartz "knowingly, willfully and fraudulently violated the terms of the contract," sought recovery of an amount alleged to represent the retained excess of drawings over commissions. *Id.* at 649, 363 N.E.2d at 552, 394 N.Y.S.2d at 845.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> 49 App. Div. 2d at 60, 371 N.Y.S.2d at 179.

<sup>50</sup> 41 N.Y.2d at 653, 363 N.E.2d at 554, 394 N.Y.S.2d at 847.

<sup>51</sup> *Id.* at 651-53, 363 N.E.2d at 553-54, 394 N.Y.S.2d at 846-47.

<sup>52</sup> *Id.* at 653-54, 363 N.E.2d at 555, 394 N.Y.S.2d at 848. Judge Cooke pointed to the Court's earlier decision in *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8, *cert. denied*, 382 U.S. 905 (1965), as illustrating that a nonresident's cumulative conduct may sustain an assertion of jurisdiction. The New York activities which the *Longines* Court found decisive were preliminary contract negotiations by high level personnel for two months, the execution of a supplementary contract, the shipment of two machines, and the presence of two engineers to supervise installation and testing of the machines. 15 N.Y.2d at 457, 209 N.E.2d at 75-76, 261 N.Y.S.2d at 19.

<sup>53</sup> 41 N.Y.2d at 651, 363 N.E.2d at 553, 394 N.Y.S.2d at 846. The Court of Appeals and several noted commentators previously have suggested that CPLR 302 jurisdiction may be premised upon a single act. *See Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 16, 256 N.E.2d 506, 507-08, 308 N.Y.S.2d 337, 339 (1970); CPLR 302, commentary at 62 (McKinney 1972); 1 WK&M ¶ 302.07; note 42 *supra*.

In both *Hi Fashion Wigs, Inc. v. Peter Hammond Advertising, Inc.*, 32 N.Y.2d 583, 300 N.E.2d 421, 347 N.Y.S.2d 47 (1973), and *Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 256 N.E.2d 506, 308 N.Y.S.2d 337 (1970), jurisdiction seems to have been predicated upon one act. *Franklyn* involved a California resident who had participated in a New York auction by telephone. In sustaining an exercise of jurisdiction based upon this incident, the Court of Appeals found a sufficiently "purposeful transaction to confer jurisdiction in New York." 26

these principles to the facts in *Schwartz*, Judge Cooke ruled that defendant's purposeful entry into New York, his interview, and entrance into an agreement which established a continuing relationship with his New York employer, coupled with the fact that the claim arose from those transactions, created "the 'clearest sort of case' in which our courts would have 302 jurisdiction."<sup>54</sup> Moreover, the Court of Appeals observed, this exercise of jurisdiction is well within constitutional bounds since "defendant has purposefully availed himself of the privilege of conducting activities in our jurisdiction, thus invoking the benefits and protection of our laws."<sup>55</sup> Acknowledging that a jurisdictionally borderline situation might have been presented if defendant had entered the state solely for the formal execution of a contract,<sup>56</sup> the Court concluded that "we have before us . . . a day [in New York] which included . . . the purposeful creation of a continuing relationship with a New York corporation."<sup>57</sup>

The exercise of in personam jurisdiction over *Schwartz* appears

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N.Y.2d at 17, 256 N.E.2d at 508, 308 N.Y.S.2d at 340. The *Hi Fashion Wigs* Court determined that a third-party defendant who had journeyed to New York for the purpose of delivering his guarantee on a contract was subject to CPLR 302 jurisdiction. Chief Judge Fuld reasoned that the contract of guarantee had been made in New York but went on to observe that even if this were not the case, New York nonetheless would exercise jurisdiction. 32 N.Y.2d at 587, 300 N.E.2d at 423, 347 N.Y.S.2d at 50.

<sup>54</sup> 41 N.Y.2d at 653, 363 N.E.2d at 554, 394 N.Y.S.2d at 847 (quoting *Hi Fashion Wigs, Inc. v. Peter Hammond Advertising, Inc.*, 32 N.Y.2d 583, 586, 300 N.E.2d 421, 422, 347 N.Y.S.2d 47, 49 (1973)).

<sup>55</sup> 41 N.Y.2d at 653, 363 N.E.2d at 554, 394 N.Y.S.2d at 847 (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

<sup>56</sup> Mere execution of a contract in New York, in itself, might not give a New York court jurisdiction over a nonresident defendant. See CPLR 302, commentary at 78 (McKinney 1972). Since other recognizable contacts usually accompany a contract execution, however, this event frequently will give rise to New York jurisdiction. See *id.* at 78-79. See generally 1 WK&M ¶ 302.09.

<sup>57</sup> 41 N.Y.2d at 653, 363 N.E.2d at 554, 394 N.Y.S.2d at 848. Defendant *Schwartz* urged that *McKee Elec. Co. v. Rauland-Borg Corp.*, 20 N.Y.2d 377, 229 N.E.2d 604, 283 N.Y.S.2d 34 (1967), dictated a finding that CPLR 302 jurisdiction could not be asserted over him. 41 N.Y.2d at 653-54, 363 N.E.2d at 555, 394 N.Y.S.2d at 848. In *McKee*, defendant, an Illinois corporation, sent a representative into New York to help resolve a dispute between a distributor of its equipment and various consulting engineers in a school project. Relying on *Hanson v. Denckla*, 357 U.S. 235 (1958), the *McKee* Court held this contact to be "infinitesimal" rather than "minimal" and refused to assert jurisdiction. 20 N.Y.2d at 382, 229 N.E.2d at 607, 382 N.Y.S.2d at 37.

The *Schwartz* Court distinguished *McKee*, noting that defendant *Schwartz* had entered into "purposeful activity in New York directed toward and resulting in the establishment of a contractual relationship . . ." 41 N.Y.2d at 654, 363 N.E.2d at 555, 394 N.Y.S.2d at 848. The situation in *McKee* was viewed as merely a casual attempt by the defendant to smooth out difficulties between its distributor and his customers. *Id.*

constitutionally permissible.<sup>58</sup> Defendant voluntarily entered the state expecting to form a business relationship with a New York corporation. In addition to being present in the state on the day of his visit, defendant negotiated and entered into an agreement creating an on-going relationship with a New York resident.<sup>59</sup> Thus, since defendant did indeed avail himself "of the privilege of conducting activities" in New York, his motion to dismiss on due process grounds was properly denied.<sup>60</sup> More importantly, however, *Schwartz* sheds additional light on the meaning of the "transacts any business" clause. The Court indicated that it is the nature and quality and not merely the quantity of a nonresident's contacts with New York that are determinative.<sup>61</sup> In evaluating these contacts, the activities of the nonresident should be viewed comprehensively and not as isolated incidents. Under these guidelines, the conclusion that defendant *Schwartz* transacted business in the state appears justifiable. The import of this holding seems clear: "[W]hen a defendant physically enters New York on a commercial enterprise, he will have a most difficult time persuading the court that he was not at least transacting business."<sup>62</sup>

#### ARTICLE 14 — CONTRIBUTION

*Third-party plaintiff may not enforce judgment for contribution until he has paid more than his Dole share to plaintiff.*

Article 14 of the CPLR, codifying the Court of Appeals' land-

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<sup>58</sup> The Supreme Court has indicated that a defendant's single contact is sufficient to enable a state court to assert personal jurisdiction over him. See *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). In *McGee*, the defendant insurance company mailed a reinsurance certificate to a California resident offering to insure the latter in accordance with the terms of the expired agreement. The record showed this to be the only contact the defendant company had with California; nonetheless, the Court concluded that due process requirements were met. 355 U.S. at 223. The New York activities of *Schwartz*, see text accompanying note 46 *supra*, appear to be more extensive and pervasive than the contacts found acceptable in *McGee*. In fact, Dean McLaughlin has stated that the exercise of jurisdiction in *Schwartz* was within the limits of the due process clause. McLaughlin, *Long-Arm Jurisdiction*, N.Y.L.J., June 10, 1977, at 2, col. 1.

<sup>59</sup> 41 N.Y.2d at 653-54, 363 N.E.2d at 554-55, 394 N.Y.S.2d at 848.

<sup>60</sup> See note 58 *supra*.

<sup>61</sup> Thus, in assessing the exercise of CPLR 302(a)(1) jurisdiction, the nature and quality of each individual defendant's activities have to be examined to determine whether he indeed was transacting business in New York. Certain factors are deemed important by courts making such a determination: (1) who was present in the state, (2) was he a high level official of the corporation, (3) what was he doing in New York, (4) were there contract negotiations in the state, and if so, of what duration? See, e.g., *Moser v. Boatman*, 392 F. Supp. 270, 272-73 (E.D.N.Y. 1975).

<sup>62</sup> McLaughlin, *Long-Arm Jurisdiction*, N.Y.L.J., June 10, 1977, at 1, col. 1.